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Supreme Court of the United States.

OCTOBER TERM, 1970.

No. ~~204~~ 70-17

THOMAS S. EISENSTADT, AS HE IS SHERIFF OF SUFFOLK COUNTY, MASSACHUSETTS,
Appellant,
v.
WILLIAM R. BAIRD,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE AMICUS CURIAE, PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS.

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Supreme Court of the United States.

October Term, 1970.

No. 804.

THOMAS S. EISENSTADT, as he is Sheriff of Suffolk County, Massachusetts,
Appellant,
v.
WILLIAM R. BAIRD,
Appellee.

BRIEF FOR THE AMICUS CURIAE, PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS.

Correction of Statement of Case by Respondent Sheriff Eisenstadt.

The Eisenstadt brief's Statement of the Case misstates an important fact in the case. The Statement of the Case (Brief, p. 4) reads in part:

> "He personally handed an unmarried adult woman a package of vaginal foam."

There was no evidence at the trial, and none appears in the record as to whether the woman was married or unmarried.* This is clear from the opinion of the Massachu-

* Nor is there any evidence off the official record as to her name or marital status.

setts Supreme Court in *Commonwealth* v. *Baird*, 355 Mass. 746. The Massachusetts court referred to the recipient as a "young lady."

It will be shown below that this fact is significant because of the decision in *Sturgis v. Attorney General*, Mass. Adv. Sh. (1970) 1139, 260 N.E. 2d 687. That case, considering the meaning and constitutionality of the birth control law (section 21), is neither cited nor discussed in the brief of the Respondent Sheriff Eisenstadt.

Argument.

I. The Inconsistent Decisions in Commonwealth v. Baird, 355 Mass. 746 and Sturgis v. Attorney General, Mass. Adv. Sh. (1970) 1139, Show that Massachusetts G.L. c. 272 § 21, Violates the Due Process Clause of the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment requires a regulatory statute to bear a reasonable relationship to a proper legislative purpose. *Nebbia* v. *New York*, 291 U.S. 502, 537; *Meyer* v. *Nebraska*, 262 U.S. 390. Two criteria must be met: (1) Is there a proper legislative purpose underlying the statute; and (2), if such a purpose is found, does the statute bear a reasonable relationship to that purpose.

The Court of Appeals in a carefully reasoned opinion held that these criteria were not met by G.L. c. 272, § 21. An examination of the two relevant Massachusetts decisions evidences the correctness of that decision.*

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* The argument (page 11 of the Eisenstadt brief) that "there is nothing in the generality of the Due Process Clause that empowers this court to nullify" the statute is readily disposed of. The argument relies on *Ferguson* v. *Skrupa*, 372 U.S. 726, 730, in which the court stated the principle that it would not substitute its wisdom for the states with respect to "their internal commer-

The first Massachusetts decision upheld the birth control law (4-3) on the grounds that it was a public health statute, saying that it put the distribution of contraceptives in the hands of doctors. *Commonwealth* v. *Baird*, 355 Mass. 746, 753:

> "The Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences. In these circumstances, absent any definite intimation, we shall not guess as to the probable attitude of the Supreme Court of the United States.
>
> "Therefore, we do not declare that a statute preventing distribution by indiscriminate persons is beyond legislative power. . . . *The legitimacy of the purpose depends upon a distinction as to the distributor and not as to the marital status of the recipient.*" (Emphasis supplied.)

Chief Justice Wilkins accurately pointed out for the majority that this rationale made the legislative distinction between married and unmarried recipients irrelevant. This point was also made by the minority, for Justices Whittemore and Cutter pointed out in their dissent at page 758:

> "If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons."

Thus, both the majority and minority in the 4-3 decision recognized that there is no reason why such drugs and arti-

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cial and business affairs." That case upheld a Kansas statute regulating the business of debt adjusting. This Court's power to measure birth control legislation against the Constitution was established in *Griswold* v. *Connecticut*, 381 U.S. 479.

cles pose any greater dangers to unmarried women than to married women.

If *Commonwealth* v. *Baird* were (as the Respondent Sheriff Eisenstadt would apparently have the Court believe) the only decision on the Massachusetts birth control law, section 21 might stand up. That decision was carefully reasoned. However, that decision is *not* the last word. The claimed public health purpose must be considered in the light of the subsequent decision in *Sturgis* v. *Attorney General*, Mass. Adv. Sh. (1970) 1139.*

In *Sturgis* it is fair to say that the Court abandoned the careful reasoning of *Commonwealth* v. *Baird*. The *Sturgis* case raised the issue of whether a gynecologist could legally prescribe a birth control device for an unmarried person when "medical opinion" was that "sound medical practice" called for such action. The Court held that a gynecologist could not prescribe for an unmarried person, saying at 1142:

> "In short, the Legislature is free to conclude that some harm may conceivably attend the employment of contraceptive devices. If such be so, the prohibition against their distribution bears a real and substantial relation to the legislative purpose. We are aware that it may well be that certain contraceptive medication and devices constitute no hazard to health, *in which event it could be argued that the statute swept too broadly in its prohibition.*" (Emphasis supplied.)

With this language, the decision brushed away (a) the fact that the statute applied one rule (of health?) to a person with a marriage certificate and another rule (of health?) to an unmarried person; (b) the fact that the statute applied

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* It is significant that the U. S. District Court opinion was issued March 20, 1970 *without* the benefit of the decision in *Sturgis* v. *Attorney General*, handed down June 29, 1970. The Court of Appeals decision was subsequent to the *Sturgis* case.

to *all* birth control methods, even those prescription and non-prescription items as to which no health question had ever been raised.

Thus, the Court denied unmarried women the right to "sound medical practice," and denied to qualified gynecologists the right to exercise their best medical judgment. Cf. *Meyer* v. *Nebraska*, 262 U.S. 390. Gynecologists could prescribe contraceptives for a woman whose husband was overseas, but not for a young lady getting married the next week. They could prescribe contraceptives for a woman legally separated from her husband, but not for a welfare mother in the ghetto. The decision contented itself with pointing out:

> "There can be no doubt that the enforcement of the statute does create certain factual situations which at best can be described as unhappy." Mass. Adv. Sh. (1970) at 1142.

Thus the Massachusetts Court virtually abandoned the public health argument, which Eisenstadt (pages 11-14) seeks to resurrect by a series of quotations and statements regarding the alleged perils of certain birth control devices. If further argument were needed, the Court of Appeals supplied it (429 F. 2d at page 1401):

> ". . . the legislature has recognized that health does not require prohibition; a physician may safely prescribe for married persons. If the prohibition which the court supports is to be taken to mean that the same physician who can prescribe for married patients does not have sufficient skill to protect the health of patients who lack a marriage certificate, or who may be currently divorced, it is illogical to the point of irrationality. For reasons we will come to, we do not believe that health is the legislative purpose, but if it is, the statute is arbitrary, and by the same token, grossly discriminatory.

"In addition, we must take notice that not all contraceptive devices risk 'undesirable . . . [and] dangerous physical consequences.' It is 200 years since Casanova recorded the ubiquitous article which, perhaps because of the birthplace of its inventor, he termed a 'redingote anglais.' The reputed nationality of the condom has now changed, but we have never heard criticism of it on the side of health. We cannot think that the legislature was unaware of it, or could have thought that it needed a medical prescription. We believe the same could be said of certain other products. Petitioner says this is true of vaginal foam. Since he failed to prove it, we cannot so find, but we may assume, broadly, that not all chemical compounds are inherently dangerous. The legislature made no attempt to distinguish, in the statutory restriction, between dangerous or possibly dangerous articles, and those which are medically harmless.

"In this posture it is impossible to think of the statute as intended as a health measure for the unmarried, and it is almost as difficult to think of it as so intended even as to the married. If there could be any doubts, it is to be noted that health protection, even for the married, had no place prior to the 1966 amendment. The legislature intended just the opposite. Consistent with the fact that the statute was contained in a chapter dealing with 'Crimes Against Chastity, Morality, Decency and Good Order,' it was cast only in terms of morals. A physician was forbidden to prescribe contraceptives even when needed for the protection of health. Commonwealth v. Gardner, 1938, 300 Mass. 372 . . . The court in Baird gave the reason for the change. 'The amendments made by St. 1966, c. 265 [Section 21A, n. 1, ante] were brought about by the decision in Griswold v. Connecticut, 381 U.S. 479 . . . which held unconstitutional as applied to married persons a statute prohibiting the use

> of contraceptives and the giving of advice on the subject.' 1969 Mass. A.S. at 729 . . . On this record we do not believe that the legislature suddenly reversed its field and developed an interest in health. Rather, it merely made what it thought to be the precise accommodation necessary to escape the *Griswold* ruling."

Indeed, the latter statement seems also to have been the conclusion of the Massachusetts Court in the *Sturgis* decision, as is set forth below.

Finally, it is worthy of note that the alleged public health purpose is contrary to official United States policy. The United States supplies family planning funds to state health agencies under Section 508 of Title V of the Social Security Act, 42 U.S.C. Section 708 (1967 Amendments), administered by the Secretary of the Department of Health, Education and Welfare. Section 208.7(e) of the Regulations promulgated under the statute, 34 F.R. 1241, requires that in order to obtain HEW financing, services in the program *must be available without regard to marital status.* (See Appendix.)

On May 21, 1971, the Department of Health, Education and Welfare announced a funding for family planning for low-income Massachusetts residents in four areas—Springfield, Lowell, Brockton and the North Shore. This program will enable nine major hospitals to provide family planning service to low-income persons in more than thirty cities and towns. *This program was made possible by the decision of the Court of Appeals.* Its fate is now in the hands of this Court because of the regulations set forth in the Appendix.

Thus, the United States has a positive policy that unmarried persons should not be discriminated against. Massachusetts purports to *require* a physician to discriminate among his patients.

The reason given in *Sturgis* v. *Attorney General* for upholding the statute is no more than the statement that this Court's decision in *Griswold* v. *Connecticut* dealt only with married persons and that the statute was modified to that extent only.* The Massachusetts Court said at 1142-1143:

> "The Supreme Court of the United States found the Connecticut statute too broad in scope and thus restricted the Legislature from interdicting distribution of birth control devices to married persons. However, the *Griswold* case, as the Attorney General argues, affirmed 'beyond doubt' the right of the State of Connecticut to enact statutes regulating the private sexual lives of single persons, *stating that the discouraging of extra-marital relations is 'admittedly a legitimate subject of state concern' and that the statutes within the basic purpose 'of protecting marital fidelity* are available to Connecticut without the need to "invade the area of protected freedoms."' *Griswold* v. *Connecticut, supra,* at 498, Goldberg, J., concurring."

Thus, the Massachusetts Court abandoned the public health argument and seized on the arguments that (a) the only constitutional protection was to married persons; and (b) the law was valid because of a purpose of "the discouraging of extra-marital relations" and "of protecting marital fidelity."

In fact, the Massachusetts statute has no rational relationship to extra-marital relations, and does nothing about "protecting marital fidelity." The statute permits *any* married person to obtain contraceptives; it prohibits any unmarried person from obtaining any contraceptives, even one as to which no question has been raised.

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* As stated above, to this extent the Massachusetts Court and the Court of Appeals agree.

This law, upheld to discourage extra-marital relations, permits any *married* person to get contraceptives:

(1) even if living apart from a spouse

(2) even if the spouse is overseas

(3) even if a decree nisi of divorce has been issued but is not absolute.

By contrast, it forbids contraceptives to a "young lady" who is getting married the following week, and to the poor person forced to rely on public health facilities.

Is the law intended to discourage fornication? As the Court of Appeals pointed out, fornication is a misdemeanor, punishable by a thirty dollar fine or three months in jail. G.L. c. 272, § 18. Violation of § 21 is a felony, punishable by five years in prison. The Court said at 1401:

> "We find it hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor."

The Court reasonably, logically, and indeed inevitably concluded the statute

> "conflicts with fundamental human rights . . . it is beyond the competency of the state." (At 1402.)

Finally, it should be noted that, whatever strength there is to the morality argument, it is inapplicable to Baird. *There was no evidence that the "young lady" who received the Emko foam from Baird was unmarried.* Neither her identity nor her marital status appears anywhere in any record. If the statute's purpose was to prevent extra-marital sex, there was a burden on the Commonwealth to show that the recipient was unmarried. There was no such evidence.

In *Commonwealth* v. *Baird*, at p. 753, Justice Wilkins and the majority recognized that the decision's logic made the distinction between married and unmarried irrelevant:

> "The legitimacy of the purpose depends upon a distinction as to the distributor and not as to the marital status of the recipient.

Baird was tried and convicted on this basis. If this logic had been followed through in *Sturgis*, and the distinction as to the marital status of the recipient held irrelevant, section 21 could be reasonably supported as a public health law. Instead, *Sturgis* completely ignored this language in *Baird*, and did not deal with the problem. *Sturgis* (1) abandoned the public health argument except to say it was legal to bar all contraceptives because a *question* had been raised as to some, and (2) fell back on an argument of "protecting marital fidelity" and "the discouraging of extra-marital relations."

If section 21 is reviewed as a morality statute, it is ineffective and illogical. Moreover, if it is a morality statute, there was a fatal gap in the proof against Baird. This in itself, however, suggests that section 21 is neither public health statute nor morality statute, but rather is an unconstitutional relic which should be declared void.

II. The Petitioner Baird has Standing to Attack the Constitutionality of the Statute under which he was Imprisoned.

The Respondent Eisenstadt argues (pages 5-9) that Baird cannot attack the constitutionality of section 21. The argument is erroneous as a matter of law.

At the outset, it should be noted that Baird attacked the constitutionality of section 21 at all times before the Massachusetts Courts. His right to do so, on the grounds argued here, was never questioned. As the Court of Appeals pointed out:

". . . the Massachusetts court implicitly recognized petitioner's standing and interest. 1969 Mass. A.S. at 735." 429 F. 2d at 1402.

Baird also raised the issue of constitutionality before the District Court, and before the Court of Appeals. Eisenstadt's challenge to Baird's standing is almost an afterthought, because (a) it does not appear in the jurisdictional statement, (b) it was never raised in any brief below, but only in the oral argument before the Court of Appeals.

It is fair to say that Eisenstadt has sought to raise the question of standing seriously only before this Court. We respectfully suggest that the issue is not timely.

Furthermore, the issue is not sound as a matter of law.

First, the Respondent Eisenstadt's brief ignores the fact that "standing" is not a simple concept, and the applicable principles depend in large part on how a case arises.

The principal category of cases on "standing" are clearly inapplicable here. These are the cases in which a *plaintiff* attacks a statute or regulations—cases dealing with the complex subject of the right to *bring* an action—*i.e.*, "standing to sue." *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150. *Barlow* v. *Collins*, 397 U.S. 159. *Flast* v. *Cohen*, 392 U.S. 83. As the Court said in *Flast* at page 101:

". . . the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."

In these cases there is usually present the issue of whether the plaintiff has a justiciable controversy under Article III of the United States Constitution. These cases are clearly not applicable.

United States v. *Raines*, 362 U.S. 17, cited by Eisenstadt, is similar in principle. The Court refused to rule on the constitutionality of the Civil Rights Act of 1957, saying at page 21:

> "This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' "

Related cases, also inapplicable, are ones in which the petitioner attacks the constitutionality of a statute before exhausting his state court remedies. *Younger* v. *Harris*, U.S. , and companion cases decided February 23, 1971. *LeClair* v. *O'Neil*, 307 F. Supp. 621 (1969), cited at pages 5 and 8 of the Eisenstadt brief, is distinguishable for this reason as well as for others. The federal court action was brought while state court action was pending.

In sharp contrast are the cases in which the constitutional attack is made by a *defendant*. *Barrows* v. *Jackson*, 346 U.S. 249, 255, 256:

> "Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-restraint for its own governance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others. See *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-348 (concurring opinion). [80 L. ed. 688, 710, 711, 56 S. Ct. 466.] The common thread underlying both requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation. This prin-

> ciple has no application to the instant case in which respondent has been sued for damages totaling $11,600, and in which a judgment against respondent would constitute a direct, pocketbook injury to her."

In that case, a civil defendant successfully pleaded the constitutional rights of others because he stood to suffer a pocketbook injury. *A fortiori*, a defendant in a criminal case should be permitted to attack the constitutionality of a statute.

Under the reasoning of *Barrows* v. *Jackson*, Baird clearly has standing to question the constitutionality of section 21. He is not raising a theoretical issue; he has been injured; he was actually in jail when released by the Court of Appeals.

The principle is well established that a defendant can successfully attack a statute which (as here) is unconstitutional on its face. Such an attack occurs most frequently when the statute conflicts with the First Amendment, as in *Thornhill* v. *Alabama*, 310 U.S. 88; *Winters* v. *New York*, 333 U.S. 507. The Respondent Eisenstadt suggests that this is the only time a defendant can argue that a statute is unconstitutional on its face. The law is otherwise. The First Amendment cases are merely the most frequent.

For example, a statute can be attacked *on its face* because it is unconstitutionally vague. *Lanzetta* v. *New Jersey*, 306 U.S. 451. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81. In these cases the Court did not consider the statute's possible applicability to the particular criminal defendant, but concerned itself only with the definiteness (or lack of it) of the statute on its face.

Similarly, as here, a defendant can attack a statute which purports to define a crime, but which violates the Due Process Clause because either (1) the statute has no proper legislative purpose, or (2) the statute is not rationally designed

to accomplish that purpose. *Meyer* v. *Nebraska*, 262 U.S. 390. In that case the Court reversed a conviction for teaching German to children below the eighth grade. The Court said at page 401:

> "The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue."

The statute was held at page 403 "arbitrary and without reasonable relation to any end within the competency of the State." Although the Court referred to the right of the defendant to carry on his profession as a teacher, it was obviously more concerned with the right of the pupils to receive instruction in German.

Hence it is well established that a defendant in a criminal case can attack the constitutionality of a statute, even though to some degree he may rely on the constitutional rights of others.

Furthermore, Baird is not in fact relying on the constitutional rights of others. As the Court of Appeals pointed out, he is arguing that the statute is void. He is not saying "I should be freed from jail because a girl getting married next week has a right to obtain medical assistance on birth control." Rather, Baird is saying "I was convicted under a statute which violates the Due Process Clause because it does not meet the test that (i) it have a rational purpose, and (ii) it be reasonably designed to carry out that rational purpose." Cf. *Meyer* v. *Nebraska*, 262 U.S. 390.

Baird's case is particularly strong because his conviction was upheld on the ground that section 21 was a public health law designed to put distribution in the hands of doctors. *After* Baird was convicted, and *after* he was in jail, the Court changed its mind and decided it was not a public health law but a law to preserve marital fidelity. It would be a mockery of justice for this Court to hold that a prisoner

could not attack the constitutionality of the statute under which he was convicted, when the rationale of the decision upholding his conviction has subsequently been repudiated by the same Court.

Conclusion.

It is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Attorneys for amicus curiae.

Appendix.

SOCIAL SECURITY ACT OF 1935, TITLE V, SECTION 508, 42 U.S.C SECTION 708.

(a) In order to help reduce the incidence of mental retardation and other handicapping conditions caused by complications associated with childbearing and to help reduce infant and maternal mortality, the Secretary is authorized to make, from the sums available under clause (B) of paragraph (1) of section 702 of this title, grants to the State health agency of any State and, with the consent of such agency, to the health agency of any political subdivision of the State, and to any other public or nonprofit private agency, institution, or organization, to pay not to exceed 75 percent of the cost (exclusive of general agency overhead) of any project for the provision of—

. . . . . .

(3) family planing services,

but only if the State or local agency determines that the recipient will not otherwise receive such necessary health care or services because he is from a low-income family or for other reasons beyond his control. Acceptance of family planning services provided under a project under this section (and section 712 of this title) shall be voluntary on the part of the individual to whom such services are offered and shall not be a prerequisite to the eligibility for or the receipt of any service under such project.

SOCIAL AND REHABILITATION SERVICE, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE SRS PROGRAM REGULATION 50-1, SECTION 208.7 (e), 34 F.R. 1241, 1242 (January 25, 1969).

Services in the project must be available:

(e) Without regard to race, religion, national origin, or maternity or marital status.